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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROY IRVIN WEEAST, Appellant.	2 CA-CR 2010-0040 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091126001

Honorable Richard D. Nichols, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Roy Weeast was convicted of arson of a structure, criminal damage of property valued between $2,000 and $10,000, forgery, and fraudulent scheme and artifice. He was sentenced to concurrent probationary terms, the longest of which is seven years, and ordered to pay restitution. On appeal, he argues the trial court erred by refusing to admit other-act evidence and in admitting hearsay statements, thereby violating his right to confrontation. For the reasons that follow, we affirm Weeast's convictions and sentences.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Weeast asked his daughter's boyfriend, Lillie, to burn Weeast's vehicle so he would not have to continue making car payments and instead could collect the insurance money. Weeast told Lillie where he should burn the car, instructed his son to remove the stereo and speakers from the car, gave Lillie the keys, and instructed Lillie to call him after he arrived at work with the car so Weeast could report it stolen. Lillie then lit the car on fire. Weeast and Lillie were indicted on four counts. Lillie pled guilty and testified against Weeast. The jury convicted Weeast of all four counts. This appeal followed.

Impeachment Evidence

¶3 Weeast argues that, based on Rule 404(b), Ariz. R. Evid., the trial court abused its discretion by refusing to allow him to impeach Lillie's motive with evidence that Lillie had started fires as a child. To preserve an argument for review, the defendant must make a sufficient argument to allow trial court to rule on the issue. *State v.*

Fulminante, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy."). "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008).

¶4 Weeast filed a notice of intent to impeach Lillie for several reasons, all based on his Sixth Amendment confrontation right. When the issue arose at trial, he asked that he be allowed to cross-examine Lillie regarding the fires but stated no additional basis for his argument. Weeast then filed an offer of proof, also citing the Sixth Amendment, listing the questions he had intended to ask.

¶5 Weeast contends that because he used the word "motive" in his notice of intent to impeach and because Rule 404(b) also contains the same word, "[t]he nature of his objection [was] clear." Weeast gave notice of his intent to impeach Lillie for "motive, intent, bias, prejudice, interest, favor, hostility, expectation of benefit, etc." And Rule 404(b) allows evidence of other acts to be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." But, simply because two of the eight terms in Weeast's notice of intent also are present in Rule 404(b) does not show he presented the trial court with sufficient opportunity to provide a remedy on that ground. *See Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d at 93.

¶6 Furthermore, in his notice, Weeast specifically stated he was bringing his challenge under the Sixth Amendment right to confront witnesses and not under Rule 608(b), Ariz. R. Evid. Rule 608 is one of the exceptions listed in Rule 404(a). Thus, Weeast expressly based his argument on the Sixth Amendment and not on the Arizona

Rules of Evidence. Having therefore failed to present the trial court with the argument he now raises, he has forfeited the right to seek relief for all but fundamental, prejudicial error, *see State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005), as Weeast essentially acknowledges.

¶7 Fundamental error review requires the defendant to establish that the error: (1) occurred; (2) was fundamental; and (3) resulted in prejudice. *See id.* We review for an abuse of discretion a trial court's limitation of the scope of cross-examination. *State v. Ellison*, 213 Ariz. 116, ¶ 52, 140 P.3d 899, 915 (2006). And we will affirm the court if it is legally correct for any reason. *State v. Chavez*, 225 Ariz. 442, ¶ 5, 239 P.3d 761, 762 (App. 2010).

¶8 Evidence of other acts "is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). Under Rule 404(b), other-act evidence may be admissible only if it falls within an exception such as proof of motive. However, Weeast does not explain how the evidence he wished to introduce—examples of Lillie's actions as a five-year-old—would show a motive to lie about Weeast's involvement in the fire.

¶9 Additionally, Weeast cross-examined Lillie on all of the evidence relating to his motive. Lillie testified that he had set the car on fire, that he had anger and mental-health problems, that he had previous disputes with Weeast and Weeast's son, and that perjuring himself by changing his testimony from that given in conjunction with his guilty plea would negatively impact his probation and might result in his imprisonment. Weeast also cross-examined Lillie on the contents of the plea agreement. Weeast's

argument that Lillie's childhood history of lighting fires when under stress showed he would act the same as an adult is an argument that Lillie had acted in conformity with his prior actions. And because Weeast fails to show how those actions would motivate Lillie's statements, the evidence is inadmissible under Rule 404(b).[1] Thus, the trial court did not err by refusing to allow cross-examination on that issue, and we need not determine whether such an error would be fundamental or prejudicial.

¶10 Weeast further argues the trial court violated his Sixth Amendment rights to confront a witness against him and to present a defense by not admitting the impeachment evidence. But, "[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). And when, as here, the limits on cross-examination are entirely reasonable, the court has not violated a defendant's confrontation right or right to present a defense. *See id.* ¶¶ 63-64 (limit on cross-examination on childhood drug use reasonable).

Business Records

¶11 Weeast next contends the trial court erred by admitting inadmissible hearsay into evidence. He asserts the insurance company records used during testimony

[1]Because we find the evidence inadmissible under Rule 404(b), we need not examine Weeast's assertions that it was not too remote or that the probative value of the evidence outweighed the prejudicial effect under Rule 403, Ariz. R. Evid.

do not qualify as "business records" because they were prepared in anticipation of litigation and, consequently, the testimony about the records should not have been admitted because it was hearsay. However, he did not object below based on that hearsay ground but rather solely based on a lack of foundation as business records. Once the foundation that the records were kept in the normal course of business was provided, he offered no further objection. "And the objection to foundation could not have preserved the hearsay issue."[2] *Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d at 684. Therefore, Weeast has forfeited the right to seek relief on the hearsay issue for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶12 Furthermore, on appeal he does not argue that admission of testimony about the records was fundamental error due to the records being hearsay. His fundamental error argument is limited to his asserting that his right to confrontation was violated by the testimony. Thus, Weeast has waived his right to fundamental error review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal). Moreover, we find no fundamental error with respect to the hearsay issue. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶13 Weeast further alleges the admission of this evidence violated his constitutional right to confrontation. Though he failed to object on this ground below,

[2]Weeast asserts in his reply brief that the objection based on foundation was sufficient to preserve the hearsay issue. However, because the trial court was focused on the foundation issue and not on hearsay, our analysis in *Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d at 684, leads us to the same conclusion here—that the objection based on foundation did not preserve the hearsay issue for appeal.

forfeiting the issue for all but fundamental, prejudicial error review, *see Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607, he argues on appeal that this error was in fact fundamental and prejudicial. Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). We begin, therefore, by determining whether there was any error, and review de novo whether the admission of evidence violated the Confrontation Clause. *See State v. Boggs*, 218 Ariz. 325, ¶ 31, 185 P.3d 111, 119 (2008).

¶14 The Confrontation Clause of the Sixth Amendment requires that "testimonial" evidence be excluded at trial unless the witness is unavailable and the opposing party previously had been able to conduct cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). We view "the facts bearing on the Confrontation Clause issue . . . in the light most favorable to the proponent of the challenged evidence, here the state." *State v. Alvarez*, 213 Ariz. 467, ¶ 3, 143 P.3d 668, 669 (App. 2006).

¶15 Weeast contends that the records—the subject of the testimony presented here—were "testimonial" because the records allegedly were prepared for litigation, *see Crawford*, 541 U.S. at 51-52, but he presents no proof of his assertion. In his opening brief, Weeast twice claims that a witness stated the insurance company may pay for part of the police investigation. But both of these statements actually were made by counsel, not by the witness; as a result, Weeast does disavow one of the statements in his reply brief. Another of his citations is to his interrogation by the police, but this reference is to

the insurance company's greater resources in conducting their own investigation. The statement does not imply, as Weeast seems to, that the insurance company would pay for part of the police investigation. None of these statements offer any proof of his allegation.

¶16 Finally, in his reply brief, Weeast makes three additional claims of evidence supporting his theory that the records were prepared for litigation. In the first, he cites to testimony by the insurance company employee explaining the general process for dealing with claims, what circumstances may raise "red flags," and what the company does in response. But this testimony does not necessarily mean the company takes these actions in preparation for litigation; they could just as easily be acting in their own interests in deciding whether to pay the claim. His second contention, on the timing of the insurance company's actions with respect to Weeast's arrest, is speculative at best. And last, he makes an unsupported claim, which we need not consider, that the insurance company representative "clearly could be expected to know that his records would be used in a resulting trial to prove what had occurred." None of these claims necessarily supports his assertion that the records were made in preparation for litigation.

¶17 Moreover, the evidence at trial was to the contrary. The witness testified that the records were kept in the ordinary course of business. And, for their own purposes, an insurance company will investigate to determine whether to pay the claim, regardless of whether there may be litigation in the future. Consequently, the admission of testimony about the insurance company's records did not violate Weeast's

Confrontation Clause right. Finding no error in the trial court's ruling, we need not address whether the alleged error was fundamental and prejudicial.

Conclusion

¶18 In light of the foregoing, we affirm Weeast's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge